

HONORABLE JAMES L. ROBERT

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

MICROSOFT CORPORATION,  
Plaintiff,  
v.  
MOTOROLA, INC., et al.,  
Defendants.

No. C10-1823-JLR

MICROSOFT'S 8/27/12 MOTION TO  
FILE DOCUMENTS UNDER SEAL

**NOTED FOR:**  
**Friday, September 7, 2012**

MOTOROLA MOBILITY, INC., et al.,  
Plaintiffs,  
v.  
MICROSOFT CORPORATION,  
Defendant.

**I. RELIEF REQUESTED**

Pursuant to Local Civil Rule 5(g) and paragraphs 2(a) and 8 of the protective order entered in this case, Microsoft respectfully seeks leave to file under seal the following documents:

- (1) Limited Portions of Microsoft's Rule 702 Motion to Preclude Testimony by Charles R. Donohoe and Dr. R. Sukumar (Microsoft's "*Daubert* Motion"); and
- (2) Exhibits 1-3 and 5 to the Declaration of Christopher Wion in Support of Microsoft's Rule 702 Motion to Preclude Testimony by Charles R. Donohoe and Dr. R. Sukumar (the "8/27/12 Wion Declaration").

MICROSOFT'S 8/27/12 MOTION TO FILE  
DOCUMENTS UNDER SEAL - I

No. C10-1823

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1 Microsoft seeks to file the foregoing materials under seal because they contain  
 2 information that has been identified by either Microsoft or Motorola as confidential business  
 3 information under the terms of the operative protective order issued in this case.

4 For these reasons, and as more fully described below, good cause exists for protecting  
 5 the confidentiality of these documents. Microsoft respectfully requests permission to file the  
 6 above-referenced documents under seal and that the Court direct such documents to remain  
 7 under seal. Microsoft is filing a redacted version of its *Daubert* Motion as part of the public  
 8 record.

## 9 II. FACTS & AUTHORITY

### 10 A. The Operative Protective Order and Applicable Court Rules Permit Microsoft to 11 File Confidential Information under Seal.

12 Pursuant to the Protective Order issued by the Court on July 21, 2011, Microsoft is  
 13 permitted to file materials designated by either party as Confidential Business Information<sup>1</sup>  
 14 under seal, with such documents to remain under seal upon Court approval. Paragraphs 2(a)  
 15 and 8 of the Protective Order govern the filing of documents under seal. Paragraph 2(a)  
 16 provides:

17 Any information submitted in pre-trial discovery or in a pleading, motion, or  
 18 response to a motion in this action, either voluntarily or pursuant to order, and  
 19 which is asserted by a supplier to contain or constitute Confidential Business  
 20 Information shall be so designated by such supplier in writing...and shall be  
 21 segregated from other information being submitted. Documents shall be clearly  
 22 and prominently marked on their face with the legend: "[SUPPLIER'S NAME]  
 23 CONFIDENTIAL BUSINESS INFORMATION, SUBJECT TO  
 24 PROTECTIVE ORDER" or a comparable notice. During the pre-trial phase of  
 25 this action, such information, whether submitted in writing or in oral testimony,  
 shall be disclosed only *in camera* before the Court and shall be filed only under

<sup>1</sup> "Confidential Business Information" is defined in the parties' Protective Order as "information which has not been made public and which concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the production, sales, shipments, purchases, transfers, identification of customers, inventories, amounts or source of any income, profits, losses, or expenditures." Protective Order Regarding the Disclosure and Use of Discovery Materials (ECF No. 72), ¶1.

1 seal, pursuant to Rule 5(g) of the Local Civil Rules of the United States District  
Court for the Western District of Washington.

2 Paragraph 8 likewise provides that:

3 Any Confidential Business Information submitted to the Court in connection  
4 with a motion or other proceeding within the purview of this action shall be  
submitted under seal pursuant to paragraph 2 above.

5 *Id.*, at ¶ 8.

6 The Federal Rules of Civil Procedure recognize that courts may permit parties to file  
7 “trade secrets or other confidential research, development, or commercial information” under  
8 seal. Rule 26(c)(1)(G) and (H). District courts “are in the best position to weigh the fairly  
9 competing needs and interests of the parties affected by discovery,” in crafting the appropriate  
10 treatment of documents for which protected treatment is requested. *Seattle Times Co. v.*  
11 *Rhinehart*, 467 U.S. 20, 36, 104 S. Ct. 2199 (1984); *see also Phillips v. General Motors Corp.*,  
12 307 F.3d 1206, 1211-1212 (9<sup>th</sup> Cir. 2002).

13 Additionally, pursuant to Local Rule CR 5(g)(2), the Court may seal a document filed in  
14 support of a non-dispositive motion upon a showing of good cause. Where the material sought to  
15 be sealed “includes information about proprietary business operations, a company’s business  
16 model or agreements with clients, there are compelling reasons to seal the material because  
17 possible infringement of trade secrets outweighs the general public interest in understanding  
18 the judicial process.” *Selling Source, LLC*, 2011 U.S. Dist. LEXIS 49664, at \*18.

19 Further, while the public generally enjoys a right to inspect and copy public records, “it  
20 is uncontested ... that the right to inspect and copy judicial records is not absolute. Every court  
21 has supervisory power over its own records and files, and access has been denied where court  
22 files might have become a vehicle for improper purposes.” *Nixon v. Warner Communications,*  
23 *Inc.*, 435 U.S. 589, 598, 98 S. Ct. 1306 (1978). As the Court recognized, one such “improper  
24 purpose” is where the commercial business information at issue is sought to be used as a  
25 “source[] of business information that might harm a litigant’s competitive standing.” *Id.*

(denying access to copies of tapes played at trial and noting that courts refused public access to their files where granting such access might “become a vehicle for improper purposes,” including causing a litigant competitive harm). Good cause exists to grant Microsoft’s motion to seal.

**B. Good Cause Exists for Maintaining under Seal Documents that Disclose Non-Public and Commercially Sensitive Information.**

**1. The Above-Referenced Exhibits to the 8/27/12 Wion Declaration Should Remain Filed under Seal**

Exhibit 1 to the 8/27/12 Wion Declaration is a copy of the transcript from the August 22, 2012 deposition of Motorola’s expert, Richard Schmalensee. At his deposition, Mr. Schmalensee testified extensively regarding the content of both his opening and rebuttal expert reports, which were both designated by Motorola as “Highly Confidential – Attorneys’ Eyes Only” under the terms of the Protective Order. Mr. Schmalensee was also examined regarding the substance of the opening report submitted by another Motorola expert, Charles R. Donohoe (discussed below). Both Mr. Schmalensee’s testimony and the expert reports referenced extensively throughout the course of his deposition disclose confidential and non-public financial and business information relating to both Microsoft and Motorola, including as it relates to their confidential licensing arrangements with third parties.

Exhibit 2 to the 8/27/12 Wion Declaration is a copy of the July 24, 2012 opening report of Motorola’s expert, Charles R. Donohoe. Motorola has affixed the following label to Mr. Donohoe’s opening expert report: “Contains Confidential Financial Information – Outside Attorneys’ Eyes Only – Subject to Protective Order.” Mr. Donohoe’s report includes an examination of, and discloses, confidential and non-public financial and business information relating to both Microsoft and Motorola, including as it relates to their confidential licensing arrangements with third parties.

Exhibit 3 to the 8/27/12 Wion Declaration is a copy of the transcript from the August 24, 2012 deposition of Mr. Donohoe. The deposition transcript has been designated as "Highly Confidential – Pursuant to Protective Order." At his deposition, Mr. Donohoe testified extensively regarding the content of both his opening and rebuttal expert reports, both of which were designated as containing confidential information subject to the terms of the Protective Order. Both Mr. Donohoe's testimony and the expert reports referenced extensively throughout the course of his deposition disclose confidential and non-public financial and business information relating to both Microsoft and Motorola, including as it relates to their confidential licensing arrangements with third parties.

Exhibit 5 to the 8/27/12 Wion Declaration consists of excerpts from the August 21, 2012 deposition of Motorola's expert, Timothy Drabik. The transcript has been designated as "Confidential Business Information Subject to the Protective Order." Mr. Drabik's deposition testimony describes technical aspects of Microsoft's products that are not generally known to the public and the disclosure of which would serve no legitimate public purpose.

Public disclosure of the confidential business information contained in the foregoing Exhibits would create an unreasonable risk of commercial harm to Microsoft (and Motorola) without any legitimate countervailing benefit to the public. Based on the foregoing, good cause exists to maintain the Exhibits under seal.

2. Microsoft's *Daubert* Motion Includes References to Confidential Information Contained in the Above-Referenced Exhibits, which Should Be Redacted

Microsoft's *Daubert* Motion includes references to and descriptions of the confidential information contained in the above-referenced exhibits to the 8/27/12 Wion Declaration. To the extent that the Court determines that those exhibits should remain filed under seal, Microsoft's *Daubert* Motion should be redacted to avoid disclosure of the confidential information contained in those exhibits. Microsoft is seeking to file under seal only those

1 limited portions of its *Daubert* Motion that contain information that should be protected from  
 2 public disclosure under the governing standards outlined above. While a complete and  
 3 unredacted version of the *Daubert* Motion is being filed under seal, Microsoft is filing a  
 4 redacted version as part of the public record.

### 5 **III. CONCLUSION**

6 Microsoft has filed the above-referenced documents under seal based on its good faith  
 7 belief that such material qualifies for protection under the terms of the Protective Order and the  
 8 applicable Court rules. A [Proposed] Order Granting Microsoft's 8/27/12 Motion to File  
 9 Documents Under Seal has been submitted herewith.

10 DATED this 27th day of August, 2012.

11 CALFO HARRIGAN LEYH & EAKES LLP

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**CERTIFICATE OF SERVICE**

I, Linda Bledsoe, swear under penalty of perjury under the laws of the State of Washington to the following:

1. I am over the age of 21 and not a party to this action.
2. On the 27<sup>th</sup> day of August, 2012, I caused the preceding document to be served on counsel of record in the following manner:

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5 DATED this 27<sup>th</sup> day of August, 2012.

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